ESSAY

Affirming the Status Quo?: The FCC, ALJs, and Agency Adjudications

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ABSTRACT

This Essay presents the first study on the benefits of Administrative Law Judges ("ALJ") for the Federal Communications Commission ("FCC"), an agency with a reputation for being politicized. Examining affirmance rates of FCC decisions at the United States Court of Appeals for the District of Columbia Circuit as a proxy for the quality of administrative factfinding, this Study suggests that ALJs do not improve the quality of FCC adjudications. Although further data is necessary, the results offer empirical support that agencies, such as the FCC, may want to follow the 1992 recommendations of the Administrative Conference of the United States to employ "administrative judges."

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INTRODUCTION

"The truth is," Commissioner Robert M. McDowell wrote, "the FCC does not know what Comcast did or did not do."[1] Commissioner McDowell dissented from a Federal Communications Commission ("FCC") adjudication in which the FCC found that Comcast undermined the benefits of the Internet and arbitrarily discriminated against peer-to-peer file sharing for anticompetitive reasons.[2] Twenty months later, a reviewing judge found that the FCC's haphazard process allowed the commissioners such a brief window for review that they could not have meaningfully evaluated the decision,[3] and therefore vacated the order.[4]

The FCC has long been considered a politicized agency, as demonstrated by several notably biased decisions.[5] For example, the FCC famously assisted Lady Bird Johnson, wife of then–Congressman Lyndon Baines Johnson, in acquiring a Texas radio station in 1943.[6] In

1 Free Press & Pub. Knowledge, 23 FCC Rcd. 13,028, 13,092 (2008) (McDowell, Comm'r, dissenting), *vacated*, Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

2 *Id.* at 13,028.

3 Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 ADMIN. L. REV. 675, 704 (2009).

4 *Comcast Corp.*, 600 F.3d at 644.

5 For a detailed description of problems that the FCC has faced, including many of those discussed in this Essay, see JONATHAN E. NUECHTERLEIN & PHILIP J. WEISER, DIGITAL CROSS-ROADS: AMERICAN TELECOMMUNICATIONS POLICY IN THE INTERNET AGE 233–60 (2005).

6 Jack Shafer, *The Honest Graft of Lady Bird Johnson: How She and Lyndon Came by*

1959, a study of adjudications before the FCC showed that newspapers that endorsed Dwight Eisenhower in 1952 fared overwhelmingly better in FCC adjudications after Eisenhower's election than those that endorsed Adlai Stevenson, Eisenhower's opponent.[7] Even today, one commentator asserts that the FCC's Enforcement Bureau is "often managed with a level of political oversight and a lack of commitment to neutral determination of complaints."[8]

Because of the breadth and importance of the FCC's jurisdiction,[9] scholars have called for the FCC to depoliticize and revamp its procedures so as to improve factfinding. Philip J. Weiser, Dean of the University of Colorado Law School and former Senior Advisor for Technology and Innovation to the Director of the National Economic

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Their Millions, SLATE (July 16, 2007, 5:06 PM), http://www.slate.com/articles/news_and_politics/press_box/2007/07/the_honest_graft_of_lady_bird_johnson.html.

7 Bernard Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 690–93 (1959).

8 Weiser, *supra* note 3, at 704–05.

9 The FCC continues to regulate a significant, and growing, segment of the American economy. The FCC made headlines in 2011 for a range of actions, including regulation of the Internet, *see* Cecilia Kang, *FCC's Net Neutrality Rules to Trigger Legal, Hill Challenge*, WASH. POST TECH BLOG (Sept. 13, 2011, 12:32 PM), http://www.washingtonpost.com/blogs/post-tech/post/fccs-net-neutrality-rules-to-trigger-legal-hill-challenge/2011/09/13/gIQALFzlPK_blog.html (noting that the FCC's "net neutrality" regulations prompted outcry from congressional Republicans); indecency on television, *see* FCC v. Fox Television Stations, Inc., No. 10-1293 (June 21, 2012); and spectrum allocation, *see* Peter Cleveland, *Spectrum Auction Would Be a Winner*, POLITICO (Oct. 11, 2011, 9:23 PM), http://www.politico.com/news/stories/1011/65644.html (explaining that the FCC has proposed an incentive auction to induce television networks to give up their spectrum licenses so that the spectrum can be used for mobile communications); Press Release, The White House, President Obama Details Plan to Win the Future Through Expanded Wireless Access (Feb. 10, 2011), http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access (same).

In 2010 alone, broadcasting and telecommunications contributed $347.3 billion to the Gross Domestic Product ("GDP") in the United States—more than farming, oil and gas extraction, and air transportation combined. *See GDP-by-industry, Value Added by Industry*, U.S. BUREAU OF ECONOMIC ANALYSIS (Dec. 13, 2011), http://www.bea.gov/iTable (follow "GDP-by-industry & Input-Output" hyperlink; click "Begin using the data" button; click radius button next to "GDP-by-industry accounts" and select "Next Step"; then expand "Value Added by Industry" button and follow "Value Added by Industry" hyperlink). One 2005 study found that "2.5% of all jobs in the United States depend on the wireless industry," one component of the FCC's jurisdiction. ROGER ENTNER & DAVID LEWIN, THE IMPACT OF THE US WIRELESS TELECOM INDUSTRY ON THE US ECONOMY 3 (2005), *available at* http://files.ctia.org/pdf/Report_OVUM_Economy.pdf. The FCC itself claims that the Internet—another alleged component of the FCC's jurisdiction—has "accounted for 15% of U.S. GDP growth" since 2004. Daily Business Release, FCC, Chairman Julius Genachowski, Broadband: Creating Jobs & Driving Econ. Growth (Sept. 27, 2011), http://www.fcc.gov/document/fact-sheet-broadband-creating-jobs-and-driving-economic-growth.

Council,[10] has called for the FCC to use independent administrative law judges ("ALJ") instead of its typical agency review process. Dean Weiser asserts that ALJs would "improve the quality of [the FCC's] policymaking process because it would provide the agency with a more rigorous factual understanding of the relevant issues than can be obtained by sorting through a paper record to identify the salient facts."[11] Similarly, Robert Atkinson, founder and President of the Information Technology and Innovation Foundation,[12] argues that decisions by ALJs would be "quicker, less expensive, more transparent, and more sustainable than the current FCC process," suggesting that courts of appeals would be more "comfortable with" and give more "credit to evidence tested" by ALJs than evidence tested through typical FCC adjudication.[13] Such sentiments are also trumpeted by Professor Rob Frieden, who testified before the FCC that ALJs may offer the agency the opportunity to review better evidence in adjudications.[14]

Given the budgetary issues confronting the United States,[15] and the expense of ALJs,[16] such claims should be tested before they are implemented. ALJs should only be used where they yield better results—for example, a higher affirmance rate—than other forms of agency adjudication. An empirical study concerning the benefits of ALJs could have broad implications for the U.S. Government, particularly because seventy-eight percent of all ALJs employed as of September 2008 will be eligible to retire by 2013.[17]

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10 *Philip J. Weiser—Dean*, UNIV. OF COLO. LAW SCH., http://lawweb.colorado.edu/profiles/profile.jsp?id=62 (last visited Apr. 6, 2012).

11 Weiser, *supra* note 3, at 707.

12 *Robert D. Atkinson*, INFO. TECH. & INNOVATION FOUND., http://www.itif.org/people/robert-d-atkinson (last visited Mar. 30, 2012).

13 Robert C. Atkinson, *Telecom Regulation for the 21st Century: Avoiding Gridlock, Adapting to Change*, 4 J. TELECOMM. & HIGH TECH. L. 379, 396–97 & n.45 (2006).

14 Comments of Professor Rob Frieden at 15, Pleading Cycle Established for Review of Media Bureau Data Practices, 25 FCC Rcd. 8236 (Aug. 13, 2010) (No. 10-103), *available at* http://ecfsdocs.fcc.gov/filings/2010/08/13/6015850173.html.

15 Jake Sherman & John Bresnahan, *Parties Still Far Apart on Supercommittee Deficit Deal*, POLITICO (Oct. 27, 2011, 11:27 PM), http://www.politico.com/news/stories/1011/67045.html.

16 In fiscal year 2011, the FCC earmarked an estimated appropriation of $451,000 for the Office of Administrative Law Judges, which did not issue a single opinion during that fiscal year. FCC, FISCAL YEAR 2012 BUDGET ESTIMATES SUBMITTED TO CONGRESS 7 (2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0214/DOC-304636A1.pdf; *see infra* note 53. ALJ salaries in 2011 ranged from $103,900 to $155,000. *Salary Table No. 2011-ALJ*, U.S. OFFICE OF PERS. MGMT., http://www.opm.gov/oca/11tables/html/alj.asp (last visited Apr. 4, 2012).

17 U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-14, RESULTS-ORIENTED CULTURES:

This Essay presents such a study, the first of its kind. Based on an examination of affirmance rates of FCC decisions at the United States Court of Appeals for the District of Columbia Circuit, this Essay suggests that ALJs do not improve the quality of FCC adjudications. After Part I reviews the role of ALJs in the decisionmaking of U.S. agencies, Part II discusses this empirical Study, its results, and the questions that remain. Finally, Part III proposes alternative means for improving FCC adjudication.

I. CONTEXT FOR THE STUDY

Agencies "conduct millions of adjudications each year"—far more than the federal courts.[18] Because of the volume of administrative adjudications, Congress enacted the Administrative Procedure Act ("APA")[19] to promote "reasonable uniformity and fairness" in agency procedures without sacrificing efficiency.[20] The APA, in part, contains procedures for informal agency adjudications, which do not require ALJs, and formal administrative adjudications, which do involve ALJs.[21] This Part will briefly discuss the costs and benefits of using ALJs before turning to the judicial decisions that have diminished the value of ALJs. Finally, this Part notes major federal court decisions concerning the level of deference that courts owe executive agencies.

A. The Benefits—and Costs—of ALJs

ALJs were created to offer "fairness and due process in executive agency actions," with adjudicators "free from agency coercion or influence."[22] The primary duties of ALJs are akin to those of a trial judge, as they preside over the process of taking evidence and finding facts.[23] Initial determinations by ALJs are reviewed by and can be overturned by the agency they serve.[24]

OFFICE OF PERSONNEL MANAGEMENT SHOULD REVIEW ADMINISTRATIVE LAW JUDGE PROGRAM TO IMPROVE HIRING & PERFORMANCE MANAGEMENT 1 (2010).

18 1 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 8.1 (5th ed. 2010).

19 Administrative Procedure Act (APA), Pub. L. No. 79-404, 60 Stat. 2237 (1946) (codified in scattered sections of 5 U.S.C.).

20 Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 231 (1986) (quoting S. REP. NO. 79-752, at 37–38 (1945)).

21 *See* 5 U.S.C. §§ 553–557 (2006).

22 VANESSA K. BURROWS, CONG. RESEARCH SERV., RL34607, ADMINISTRATIVE LAW JUDGES: AN OVERVIEW 1 (2010).

23 5 U.S.C. §§ 553–557.

24 BURROWS, *supra* note 22, at 1 n.6.

ALJs' independence from the agencies with which they are affiliated is simultaneously a great strength and weakness. Under the APA, ALJs are free from supervision or direction by agency employees "engaged in the performance of investigative or prosecuting functions."[25] Although ALJs are hired by individual agencies, the Office of Personnel Management is tasked with the initial examination and selection of applicants for ALJ positions and controls ALJ compensation.[26] Once hired, ALJs receive a career appointment and need not even complete a probationary period before receiving various protections.[27] Career appointment means that ALJs can only be fired, suspended, or given a reduction in pay "for good cause established and determined" after a hearing in front of the Merit Systems Protection Board.[28] ALJ compensation is set without regard to an agency's evaluations or recommendations.[29] Even terminating an ALJ is very difficult; between 1946 and 1992, agencies successfully terminated ALJs only five times in twenty-four attempts.[30] Moreover, the process is "expensive, time consuming, and disruptive."[31]

This independence allows ALJs to seek evidence and render decisions without becoming subject to improper politicization or other influence from the agencies they serve.[32] By the same token, however, independence leads to agencies' "loss of control over policy; potential for interdecisional inconsistency; and loss of control over quality and productivity."[33] Because it is difficult for agencies to dismiss them or reduce their salaries, ALJs can be inefficient and unaccountable, which can be problematic for the agencies they serve. One U.S. General Accounting Office ("GAO")[34] study found that the most productive ALJs at various agencies decide over twice as many cases as the

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25 5 U.S.C. § 554(d)(2).

26 Jeffrey S. Lubbers, *Federal Administrative Law Judges: A Focus on Our Invisible Judiciary*, 33 ADMIN. L. REV. 109, 112 (1981).

27 5 C.F.R. § 930.204 (2011). ALJs can, however, "be subject to an agency reduction in force" when there are too many employees in a particular line of work in a particular location. BURROWS, *supra* note 22, at 9.

28 5 U.S.C. § 7521 (2006).

29 *Id.* § 537(b); *see also* Jeffrey S. Lubbers, *The Federal Administrative Judiciary: Establishing an Appropriate System of Performance Evaluation for ALJs*, 7 ADMIN. L.J. AM. U. 589, 590 (1994).

30 BURROWS, *supra* note 22, at 9.

31 2 PAUL R. VERKUIL ET AL., ADMIN. CONFERENCE OF THE U.S., RECOMMENDATIONS & REPORTS 985, 1018 (1992).

32 *See* BURROWS, *supra* note 22, at 1.

33 VERKUIL ET AL., *supra* note 31.

34 The U.S. General Accounting Office's name was changed to the "U.S. Government Accountability Office" in 2004. 31 U.S.C. § 702 (2006).

least productive ALJs, and less productive ALJs outnumbered the more productive ALJs.[35] Because it is very difficult to penalize ALJs for low productivity, agencies are left in a bind.[36]

Perhaps in part because of the lack of agency control, ALJ cases can be extended affairs. A GAO study in 1978 found that the FCC's ALJ cases took the longest of those at thirteen agencies surveyed, averaging 569 days to issue a decision.[37] By contrast, the median time interval to disposition of the 252,273 cases filed in the United States district courts in fiscal year 2010 was approximately 230 days.[38] Although many cases do not take the full 569 days, even short delays can have serious consequences when dealing with quickly evolving technologies like the Internet and mobile telephones.[39]

One such problem surfaced in 2009 when the FCC's Media Bureau ordered an ALJ to conclude a case within sixty days.[40] The ALJ expressed concern about the timeframe and refused.[41] When the ALJ set a hearing date beyond the deadline,[42] the FCC adjudicated without the ALJ's decision.[43] Such examples demonstrate the potential for ALJs to delay decisionmaking and increase the costs of such procedures at agencies. Empirical research should ensure that ALJs, in turn, provide the FCC benefits, in the form of better decisionmaking and factfinding, on par with those costs.

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35 U.S. GEN. ACCOUNTING OFFICE, FPCD-78-25, ADMINISTRATIVE LAW PROCESS: BETTER MANAGEMENT IS NEEDED 32 (1978) (finding that in 1975, nine National Labor Relations Board ALJs averaged twenty-nine cases for the year while twenty-three averaged twelve, and that at the Occupational Safety and Health Review Commission, six ALJs averaged ninety-five cases while thirteen averaged forty-four); *see also* Lubbers, *supra* note 29, at 594.

36 BURROWS, *supra* note 22, at 8; Lubbers, *supra* note 29, at 600 ("Although agencies can bring charges against ALJs for low rates of production, there's 'a virtually insurmountable burden of proof.'").

37 U.S. GEN. ACCOUNTING OFFICE, *supra* note 35, at 59.

38 JAMES C. DUFF, JUDICIAL BUS. OF THE U.S. COURTS, 2010 ANNUAL REPORT OF THE DIRECTOR 175 tbl.c-5 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/JudicialBusinespdfversion.pdf. The median time for disposition at trial at the district courts was 22.9 months, slightly more than 100 days longer than the average for ALJs. *Id.*

39 *See, e.g.*, *supra* note 9.

40 Herring Broad., Inc. (*Herring Broad. II*), 23 FCC Rcd. 18,316, 18,317 (2008), *rescinded by* 24 FCC Rcd. 1581 (2009).

41 Herring Broad., Inc. (*Herring Broad. I*), MB Docket No. 08-214, FCC 08M-47, at 3 (Nov. 19, 2008), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=6520190098.

42 *Id.*

43 *Herring Broad. II*, 23 FCC Rcd. at 18,324.

B. *The Slow Demise of the Formal "Hearing"*

Courts have responded to the costs and delays that ALJs can create for agencies. The APA sets forth elaborate formal adjudication procedures, but few requirements for informal adjudication.[44] The courts struggled for years to establish an appropriate level of procedural guarantees for when adjudication is required, as it is for the FCC, after a "hearing."[45] In 1973, the Supreme Court found that where a statute required a "hearing," but did not specify that it be "on the record after opportunity for an agency hearing," agencies could use informal rulemaking procedures.[46] The Court wrote that "the term 'hearing' . . . does not necessarily embrace either the right to present evidence orally and to cross-examine opposing witnesses, or the right to present oral argument to the agency's decisionmaker."[47] Nevertheless, it took nearly forty years before the last holdout—the United States Court of Appeals for the Ninth Circuit—came to a similar conclusion about informal adjudications.[48]

For the D.C. Circuit, which has exclusive jurisdiction to review many FCC decisions, the law changed earlier.[49] The D.C. Circuit found, in 1989, that adjudications requiring simply a "hearing" could be decided at the level of formality that the agency, in its discretion, reasonably saw fit.[50] The court found that an agency could use largely written informal adjudicatory procedures in lieu of formal procedures with testimony and cross-examination, even where a statute called for a "public hearing."[51]

Like other agencies that have migrated away from formal adjudicatory procedures, the FCC, which at one point had thirteen ALJs, now has only one ALJ.[52] The FCC's Office of Administrative Law Judges, which published twenty-seven opinions in 1988 alone, has released only eight opinions since 2000.[53] The agency instead has relied

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44 *Compare* 5 U.S.C. § 554 (2006) (noting limited requirements for all agency adjudications), *with id.* §§ 556–557 (laying out some of the procedures required in formal adjudication).

45 *See, e.g.*, 47 U.S.C. § 309 (2006) (allowing for "notice and opportunity for a hearing").

46 United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 236–38 (1973).

47 *Id.* at 240.

48 United Farm Workers of Am. v. EPA, 592 F.3d 1080, 1082 (9th Cir. 2010).

49 47 U.S.C. § 402(b) (2006).

50 Chem. Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1482 (D.C. Cir. 1989).

51 *Id.* at 1478–79.

52 *Office of Administrative Law Judges Staff*, FED. COMMC'NS COMM'N, http://www.fcc.gov/encyclopedia/office-administrative-law-judges-staff (last visited Mar. 30, 2012).

53 These totals can be documented by reviewing the *Federal Communications Commission Reports*, *Federal Communications Commission Record*, and *Daily Digest*, and are based on searches of those resources in LexisNexis. For recent opinions, see *Office of Administrative Law*

almost "exclusively on paper proceedings augmented by private lobbying."[54] Although these procedures have cast doubts on the FCC's ability to develop a meaningful evidentiary record without *ex parte* meetings between decisionmakers and litigants,[55] an empirical examination of affirmance rates suggests that judges have given more deference to the FCC's informal process than to the work of its ALJs. In order to contextualize the results, however, it is important to compare them to results in other areas in which courts give deference to agencies.

C. *Empirical Reflections of Deference to Agencies*

The Supreme Court has decided a number of cases within the last several decades that assure deference to agency decisionmaking. This Part will briefly discuss two of the most important of those cases, as well as empirical results that researchers have found based on the decisions.

1. Chevron *Deference*

In 1984, the Court decided *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*[56] The Supreme Court wrote that, when reviewing an agency's construction of a statute which it administers, a court must first decide if the intent of Congress is clear.[57] If it is, the court must accept and enforce Congress's intent.[58] If not, the court must uphold any reasonable interpretation by an agency.[59] Professor Orin S. Kerr completed an empirical analysis of each of the 253 applications of the *Chevron* doctrine in the United States courts of appeals from 1995 to 1996.[60] He found that the circuit courts, when applying the *Chevron* doctrine, affirmed the agency's construction seventy-three percent of the time;[61] however, when the decisions were based on the second step of *Chevron* analysis—that is, when the intent of Congress was not clear—they affirmed eighty-nine percent of the time

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Judges Headlines, FED. COMMC'NS COMM'N, http://www.fcc.gov/encyclopedia/office-administrative-law-judges-headlines (last visited Mar. 30, 2012).

54 Atkinson, *supra* note 13, at 397.

55 Weiser, *supra* note 3, at 701; *see supra* notes 1–14 and accompanying text.

56 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

57 *Id.* at 842.

58 *Id.* at 842–43.

59 *Id.* at 843–44.

60 Orin S. Kerr, *Shedding Light on* Chevron*: An Empirical Study of the* Chevron *Doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1, 30 (1998).

61 *Id.*

(in 100 of 112 cases).[62] Other studies have suggested that *Chevron* has increased the deference that courts of appeals—and the D.C. Circuit in particular—show agencies.[63]

2. Skidmore *Deference*

In 2001, the Supreme Court revived *Skidmore v. Swift & Co.*,[64] holding that courts must defer to certain agency actions according to their "persuasiveness."[65] Courts use *Skidmore* when an agency's interpretation of a statute does not qualify for *Chevron* deference, but merits some deference based on the agency's expertise and the effort expended to articulate the position.[66] Professors Kristin E. Hickman and Matthew D. Krueger analyzed cases involving *Skidmore* analysis, finding that courts accepted the agency's interpretations 60.4% of the time (in 64 of 106 cases), a statistically significant lower level of deference than Professor Kerr found was given in *Chevron* cases.[67]

Other studies of affirmance rates of agency decisions have found variances, but all hovered near seventy percent. These studies have found affirmance rates ranging from sixty-four to eighty-one percent in *Chevron* cases, fifty-five to seventy-one percent in *Skidmore* cases, and seventy-six percent in cases examining agency interpretations of agency rules.[68] Professor David Zaring has found that

> whether the question is one of fact, law, or arbitrariness, whether the agency procedures were formal or informal, whether judicial deference is required or not, the courts—even though in theory they would apply different degrees of scrutiny to each of these questions—reverse agencies slightly less than one third of the time.[69]

The affirmance rates under the *Chevron* and *Skidmore* standards offer a baseline for the similarly deferential review examined in the next Part, which studies an issue not previously examined: whether ALJs increase an agency's affirmance rate in courts of appeals.

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62 *Id.* at 31.

63 *See, e.g.*, Aaron P. Avila, Student Article, *Application of the* Chevron *Doctrine in the D.C. Circuit*, 8 N.Y.U. ENVTL. L.J. 398, 429 (2000).

64 Skidmore v. Swift & Co., 323 U.S. 134 (1944).

65 United States v. Mead Corp., 533 U.S. 218, 221 (2001).

66 *Id.* at 227–28, 234–35.

67 Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern* Skidmore *Standard*, 107 COLUM. L. REV. 1235, 1275 (2007).

68 Richard J. Pierce, Jr. & Joshua Weiss, *An Empirical Study of Judicial Review of Agency Interpretations of Agency Rules*, 63 ADMIN. L. REV. 515, 520 (2011).

69 David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 137 (2010).

II. Empirical Study and Results

Given the importance of the FCC's jurisdiction and the notoriety of its decisionmaking, there have been persistent calls to reform the its processes. As noted above, one of the most concrete recommendations is for the FCC to return to utilizing more ALJs.[70] Given the costs and delays of employing ALJs, it is important to analyze such an investment carefully.

This Part conveys the results of a Study intended to test the assumption that administrative decisions premised on factfinding and initial decisions by ALJs are "better" than those that never involved ALJs. As a proxy for quality of factfinding and decisionmaking, this Study looks to the affirmance rates of reviewing courts, where higher affirmance rates should suggest generally higher quality decisions and factfinding. As an initial prediction, one might expect that the affirmance rates for ALJ adjudications would be higher than non-ALJ adjudications because some scholars have suggested that appellate judges inherently prefer ALJ factfinding over other forms of adjudication, thinking ALJs to be like the district court judges with whom appellate courts are familiar.[71]

A. Procedures and Results

To create a database of decisions in which FCC ALJs participated, I searched for every U.S. court of appeals case in which the FCC was a party and that contained the terms "Administrative Law Judge" or "ALJ." This search produced 154 cases. I analyzed every case, excluded cases that mentioned "ALJ" but were not decided by an ALJ (such as those that merely mentioned "ALJ" in a citation), and then checked to see whether the FCC Review Board or the Commission had overturned the ALJ's opinion. I noted the result of the circuit court's opinion and discarded cases that were not decided on the merits (such as those dismissed for jurisdictional or standing issues). One hundred and four cases remained ("FCC ALJ Cases"), decided from 1975 to 2005. Of the FCC ALJ Cases, thirty-two (30.8%) were reversed or remanded, at least in part, on issues related to the ALJ's factfinding or decision. Seventy-one of the decisions (68.3%) were affirmed or had the petition for review denied. Twenty-five of the opinions (24%) were decided *per curiam*, and of those, twenty-four (96%) were affirmed.

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70 *See supra* notes 11–14 and accompanying text.

71 *See supra* note 13 and accompanying text.

Twenty-three of the ALJ decisions were overturned by the FCC before the case arrived at the circuit court, so that the judges examined the FCC's decision instead of the decision of the ALJ. Of the cases overturned by the FCC, eighteen (78.3%) were affirmed. The circuit court cases examining an overturned ALJ opinion were not affirmed at a statistically significant different rate than those where the ALJ's opinion was left untouched. Because claims about ALJs tend to focus on their factfinding and not decisionmaking, and because even cases where the FCC overturned the ALJ decision are relevant to an analysis of the quality of ALJ factfinding, I analyzed the cases together—that is, cases representing ALJ factfinding.

Only two of the FCC ALJ cases were decided by a circuit court other than the D.C. Circuit, which has exclusive appellate jurisdiction over most FCC adjudications.[72] Because of the preponderance of decisions from the D.C. Circuit and that court's reputation for a particularly low affirmance rate in administrative cases,[73] I limited the comparison between cases decided by ALJs and those not decided by ALJs to those decided in the D.C. Circuit to avoid any biases.

To create a database for comparison to FCC cases that did not involve ALJs, I further narrowed the analysis to only those ALJ cases before the D.C. Circuit that cite 47 U.S.C. § 309,[74] which sets forth laws related to the application of licenses for spectrum ("FCC ALJ Cases Citing § 309"). I then analyzed all D.C. Circuit cases in which the FCC was a party that cite 47 U.S.C. § 309 but that were not appeals of ALJ decisions ("FCC Non-ALJ Cases Citing § 309"). Once again, the analysis focused only on those cases decided on the merits. While sixteen of the thirty-three FCC ALJ Cases Citing § 309 were affirmed (48.5%), 72 of the 102 FCC Non-ALJ Cases Citing § 309 (70.6%) were affirmed.

B. Comparisons

1. ALJ Versus Administrative Cases

If ALJs provide high quality factfinding, then one would expect the FCC ALJ Cases to have high affirmance rates relative to other administrative cases. To test this expectation, the 68.3% affirmance

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72 47 U.S.C. § 402(b) (2006).

73 *See* Richard J. Pierce, Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 ADMIN. L. REV. 77, 90 (2011) (noting that the D.C. Circuit tends to affirm eleven or twelve percent fewer administrative cases than the other circuits).

74 47 U.S.C. § 309 (2006). The law's content has varied over the forty years of the agency's existence, but continues to set forth the process for applying to the FCC for spectrum.

rate of FCC ALJ Cases can be compared first to the level at which all administrative decisions are affirmed and second to the affirmance rate of agency decisions requiring special judicial deference.

a. Administrative Appeals

The *Judicial Business of the United States Courts* presents statistics about the number and type of cases at federal courts throughout the country.[75] Notably, the United States courts of appeals have decided 40,853 administrative appeals on the merits since 1997 and affirmed 28,839 (70.6%). In that same time period, the D.C. Circuit affirmed 73.6% of its administrative appeals on the merits (1223 of 1662 cases).[76]

Although the D.C. Circuit affirmed FCC ALJ Cases at a lower rate than administrative appeals, the difference between its 68.3% affirmance rate for the FCC ALJ Cases and 73.6% for administrative appeals is not statistically significant because of the relatively low number of FCC ALJ Cases. Statistically speaking, there is only an 85% confidence level that the two affirmance rates are different—it is possible that the two affirmance rates would be the same if more FCC ALJ Cases had been decided.

b. Administrative Appeals Requiring Deference

The affirmance rate for FCC ALJ Cases is also statistically comparable to the affirmance rate for administrative law cases decided pursuant to the *Chevron* and *Skidmore* doctrines. The FCC ALJ Cases' affirmance rate is higher than the rate for *Skidmore* decisions that Professors Hickman and Kreuger found.[77] It is not statistically significantly different, however, from the rate for *Chevron* cases per Professor Kerr's analysis.

In the current political and economic climate,[78] ALJs should only be used where they yield better results—here, a higher affirmance rate—than other forms of agency adjudication. Because FCC ALJ Cases are affirmed at a rate similar to cases meriting *Chevron* deference, one could infer that the FCC ALJ Cases were similarly favored by courts. That may be misleading, however. In the *Chevron* cases

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75 Circuit court data for this section was derived from the *Judicial Business of the U.S. Courts*, U.S. COURTS, http://www.uscourts.gov/Statistics/JudicialBusiness.aspx (last visited Mar. 30, 2012).

76 The D.C. Circuit has a higher affirmance rate at a 99% confidence level.

77 This is statistically significant at the 90% confidence level.

78 *See supra* note 15 and accompanying text.

analyzed by Professor Kerr, courts affirmed an agency's interpretation 89.3% of the time when they found a statute ambiguous—higher (at a 99% confidence level) than the rate at which the FCC ALJ Cases were affirmed.[79] Cases in which the court found that an agency "unreasonably" interpreted an unambiguous statute resulted in the lower overall affirmance rate for *Chevron* cases.[80]

Similarly, that the difference between the affirmance rate for FCC ALJ Cases and for all administrative appeals at the D.C. Circuit is not statistically significant does not make a strong statement for the use of ALJs. It might be expected that ALJs, by virtue of being independent decisionmakers and using processes more akin to those with which courts of appeals are familiar, would obtain affirmance rates higher than average at the courts of appeals. That ALJs do not fare better, however, may undermine their utility to federal agencies.

2. *FCC ALJ Versus FCC Non-ALJ*

Although comparing the affirmance rate of FCC ALJ Cases to other administrative appeals can be helpful in determining the benefit of using ALJs, a more useful comparison may be between FCC ALJ Cases Citing § 309 and FCC Non-ALJ Cases Citing § 309. To test the difference between such cases, I examined those D.C. Circuit cases in which the FCC was a party and which cite to 47 U.S.C. § 309. As noted above, the D.C. Circuit affirmed 72 of the 102 FCC Non-ALJ Cases Citing § 309 (70.59%).[81] On the other hand, it affirmed only 17 of the 33 cases (51.52%) involving ALJs.[82] There is a statistically significant difference in the outcomes of the cases at the 95% confidence level, with the FCC Non-ALJ Cases Citing § 309 actually faring better at the appellate level. However, there is no statistically significant difference between affirmance rates of the FCC Non-ALJ Cases Citing § 309 and the complete set of FCC ALJ Cases (including those not citing § 309).

3. *Conclusions and Analysis*

One concern about the empirical research in this Study may be, as in every study, selection bias. Like any empirical study, this Study is limited by the data and procedures upon which it is based.[83] This

79 Kerr, *supra* note 60, at 31.

80 *Id.* at 30.

81 *See supra* Part II.A.

82 *Id.*

83 *See* Kerr, *supra* note 60, at 17.

Section addresses potential concerns with the dataset, the number of appeals, and the broader role of the federal courts.

a. The Dataset

This Study examined a relatively small dataset, though it was necessarily limited by the number of FCC ALJ Cases that have been appealed and decided on the merits. The dataset is comparable to other studies, such as Hickman & Krueger's *Skidmore* study, which involved only two more cases.[84]

There is also some variation in the cases decided by ALJs at the FCC,[85] and there is some variation, moreover, in the cases that cite 47 U.S.C. § 309. Spectrum cases can involve television, mobile telephones, radio, or satellite communications.[86] The cases may also be skewed because they take place across a thirty-year period, during which technologies developed rapidly, and even the process by which spectrum is allocated has evolved.[87] Avoiding such changes when monitoring an agency like the FCC, however, may be difficult.

There may also be concerns that there is selection bias because the FCC would only choose to send the hardest cases—or, perhaps, most fact-intensive cases—to ALJs. If this were the case, then this would suggest that the equal affirmance rates for FCC ALJ Cases and FCC Non-ALJ Cases Citing § 309 could be explained because the ALJs would simply be doing a better job with harder cases. Thus, under these circumstances, one might predict that the affirmance rate of FCC Non-ALJ Cases Citing § 309 would decline as the agency adjudicated more cases without ALJs. The Study showed, however, that twenty-six of the twenty-eight § 309 cases (92.9%) before the D.C. Circuit since January 2000 were affirmed, a much higher affirmance rate than the FCC Non-ALJ Cases Citing § 309 before 2000.[88] Despite the significantly higher recent affirmance rates, even the earlier FCC Non-ALJ Cases Citing § 309 still have a higher affirmance rate than the FCC ALJ Cases Citing § 309.[89] This suggests that neither the

84 *See supra* note 67 and accompanying text.

85 *Compare* Damsky v. FCC, 199 F.3d 527 (D.C. Cir. 2000) (FM radio), *with* Achernar Broad. Co. v. FCC, 62 F.3d 1441 (D.C. Cir. 1995) (television), *and* Tel. & Data Sys., Inc. v. FCC, 19 F.3d 655 (D.C. Cir. 1994) (per curiam) (mobile telephones).

86 *See, e.g.*, *supra* note 85.

87 *See* NUECHTERLEIN & WEISER, *supra* note 5, ch. 7 (discussing the transition for spectrum allocation from hearings to lottery to auctions).

88 These would include seventy-four cases, of which forty-six were affirmed. The difference is significant at a 99% confidence level.

89 This is, however, only at an 80% confidence level, so not statistically significant.

timing of the cases, nor the changing technologies or legal structure affecting allocation of spectrum creates a substantial bias against the ALJ cases.

Further suggesting that the FCC ALJ Cases were not the most difficult cases is that, of the 104 FCC ALJ cases, 25 were decided per curiam. Per curiam decisionmaking indicates that the cases were not particularly difficult decisions.

b. Number of Appeals

Similar arguments rebut contentions that a large percentage of FCC ALJ Cases are overturned because only the ALJs' worst decisions are challenged. If only a small percentage of cases initially decided by ALJs are ever appealed, it might suggest a public perception that they were well decided and thus that litigants avoid challenging them.

As of June 2012, 873 initial ALJ decisions had been published in the *Federal Communications Commission Reports*, *Federal Communications Commission Record*, and *Daily Digest* since 1972.[90] Only 12% of those FCC ALJ opinions reached a merits decision on appeal (104 out of 872).[91] As a baseline for comparison, in the first decade of this century, 2,078,435 civil cases were terminated by court action in the district courts of the United States.[92] Of these cases, 327,421 were appealed to the circuit courts (15.8%).[93]

This comparison is not exact, however, because even on appeal, parties tend to settle before the appellate court can issue a decision on the merits of the case.[94] In fact, since 1997, only 44.5% of administrative appeals terminated in the circuit courts were decided on the merits.[95] The numbers are even lower in the D.C. Circuit, where the median is around 25% and the rate has not exceeded 32% in any

90 *See e.g.*, FCC, 30 DAILY DIGEST, no. 196 (Oct. 11, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Digest/2011/dd111011.html.

91 *See supra* Part II.A.

92 These numbers were compiled from statistics available in the *Judicial Business of the United States Courts, supra* note 75.

93 Compiled from statistics published in the *Judicial Business of the United States Courts, supra* note 75, looking at total civil cases terminated by district courts and subtracting those not terminated by court action (Table C-4). This was then compared with the number of civil cases brought from district to circuit courts (Table B-7).

94 Chris Guthrie & Tracey E. George, *The Futility of Appeal: Disciplinary Insights into the "Affirmance Effect" on the United States Courts of Appeals*, 32 FLA. ST. U. L. REV. 357, 363 (2005).

95 Compiled from statistics available in Table B-5 from each year's *Judicial Business of the U.S. Courts, supra* note 75.

given year.[96] Although the comparison is limited because ALJ adjudications are in some ways inherently different than cases in front of a district court,[97] the number of appeals of cases originally decided by ALJs at the FCC may have been three times higher than the number decided on the merits, suggesting that the portion of ALJ decisions which are appealed is not low when compared to federal district court cases.

c. *Role of the Courts*

Finally, this Study may present important information about the federal courts. Just as the circuit courts affirm approximately two-thirds of administrative cases regardless of the standard of review,[98] the D.C. Circuit appears to affirm approximately two-thirds of FCC cases regardless of who the initial decisionmaker is.[99] The theory that ALJ involvement leads to better decisionmaking is diminished because there is no statistical support demonstrating that the appellate courts perceive that cases involving ALJs tend to be decided better as an initial matter. Although Professor Zaring has received support for the idea of replacing administrative standards of review with a single "reasonable agency" theory,[100] even if courts were de facto operating under that theory, and if the quality of FCC ALJ Cases' decisions was superior to other agency decisions, that difference should be represented by reviewing courts giving higher affirmance rates to supposedly better-reasoned ALJ decisions and factfinding. Such a trend is not reflected in this data.

Thus, this Study suggests that ALJs fail to offer the type of quality factfinding and decisionmaking that would presumably lead to higher affirmance rates in the courts of appeals. Not only do the FCC ALJ Cases fail to demonstrate a higher affirmance rate than FCC Non-ALJ Cases Citing § 309, they also fail to distinguish themselves from other administrative appeals at the D.C. Circuit.

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96 *Judicial Business of the U.S. Courts*, *supra* note 75.

97 *See* Charles H. Koch, Jr., *Policymaking by the Administrative Judiciary*, 56 ALA. L. REV. 693, 700 & n.36 (2005) ("[W]hile administrative adjudications use the trial as a model, they may and often do deviate from that mode, sometimes substantially.").

98 *See supra* notes 67–68 and accompanying text.

99 *See supra* Part II.A.

100 Zaring, *supra* note 69, at 186–87.

III. ALTERNATIVES FOR BETTER FACTFINDING

As discussed above, ALJs can present significant challenges to the agencies that employ them.[101] Because ALJ decisions do not appear to offer higher quality decisionmaking, this Study suggests that federal agencies should not make the significant investments necessary to retain ALJs for adjudications. This Part will briefly discuss additional research that could help clarify the policy issues involved, before turning to a short-term solution that agencies might employ to achieve some of the benefits of ALJs at lower costs.

Further studies should examine whether other agencies see similar results from ALJs. This research may be pertinent in helping to frame important budget and policy decisions for Congress because the majority of the ALJs in the federal government are eligible to retire soon.[102] Further, with affirmance rates hovering around seventy percent for administrative appeals without regard to the standard of review or—perhaps—the factfinder, empirical research is necessary to discover what agencies can do to raise the quality of their decisionmaking and reduce the quantity, and therefore the costs, of appeals.[103]

This Study offers empirical support that agencies, such as the FCC, may want to follow the 1992 recommendations of the Administrative Conference of the United States to employ "administrative judges" ("AJ").[104] AJs can hear cases like ALJs, but can be hired through normal agency processes and held accountable to agency personnel. Ideally, AJs can offer some of the same opportunities for fairness and factfinding as ALJs without some of the problems.[105] To enhance the perception of AJs as reputable decisionmakers, the FCC could publish guidelines for the AJs so that the public would be aware of how, if at all, agency bias would be implemented in the process.[106] AJs meet the constitutional requirement for due process, as courts

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101 *See supra* Part I.A.

102 *See supra* note 17 and accompanying text.

103 *See supra* notes 67–68 and accompanying text. Among many options for continued research, a multivariable examination of quantifiable preappellate decision aspects—such as the length of an agency record, the political party of the agency lawyer (if applicable) compared with that of the judges, the number of amici, and different statistics about the brief (such as word length and number and types of citations)—could illuminate the process of appellate decisionmaking.

104 For a discussion of the recommendations, see VERKUIL, *supra* note 31, at 983. Here, I borrow the unofficial terminology of Verkuil. *See id.*

105 *See id.* at 985; James P. Timony, *Performance Evaluation of Federal Administrative Law Judges*, 7 ADMIN. L.J. AM. U. 629, 640–41 (1994) (suggesting that the Administrative Conference of the United States improperly made recommendations without "accurate empirical evidence").

106 VERKUIL, *supra* note 31, at 985.

have found that administrative decisionmakers need not have the high level of independence of ALJs.[107] Because AJs can cost significantly less than ALJs and because agencies can require greater productivity from them, the FCC could benefit by employing AJs for its adjudications.[108]

AJs, however, may provide limited benefits to the FCC. First, because the agency has been criticized heavily for allowing politicization of its decisionmaking process and for relying on *ex parte* contacts,[109] there is reason to doubt the agency's ability and willingness to allow AJs proper levels of independence when independence is not statutorily required. Second, while ALJs' independence and status may help to attract highly qualified applicants,[110] the FCC may be forced to hire less qualified applicants as AJs. The FCC would be free, however, to hire AJs with subject matter experience,[111] something that ALJs may not have. Third, although the FCC may require that AJ adjudications be more efficient than ALJs', AJ adjudications likely will take longer than paper hearing adjudications.

Finally, although ALJs arguably give the FCC an appearance of fairness,[112] that appearance is not reflected in the number of appeals that involve initial ALJ decisions. Because the rates of appeal for such cases are not particularly low, there is reason to believe that the risk to the FCC in abandoning ALJs will not affect public confidence in the agency. Thus, AJs can offer the FCC some of the benefits of ALJs without all of the costs.

CONCLUSION

Although several scholars have called on the FCC to use ALJs to develop better and less politicized evidentiary records, the empirical results of cases appealed to the D.C. Circuit suggest that ALJs will not provide the desired benefits. Instead, the FCC may want to engage AJs to offer some of the benefits of ALJs, without all of the costs. Further studies can help substantiate whether Congress should implement broad changes to the system of agency adjudications.

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107 *Id.* at 978–79.

108 *Id.* at 985. AJs, unlike ALJs, can be subjected to normal supervision and evaluation, allowing the agency to demand that they meet productivity standards.

109 *See supra* notes 11–14 and accompanying text.

110 VERKUIL, *supra* note 31, at 980–81.

111 *See* BURROWS, *supra* note 22, at 5.

112 *See* VERKUIL, *supra* note 31, at 979.